UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

DATE: June 27, 1997

CASE NO.: 95-INA-124

In the Matter of:

GATEWAY CONTRACTORS, INC.,
Employer,

on behalf of

Jose Ferreira,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Jose Ferreira (Alien) by Gateway Contractors, Inc., (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On February 26, 1993, the Employer, Gateway Contractors, Inc., filed an application for labor certification to enable the Alien, Jose Ferriera, to fill the position of Cabinet Maker. AF 03. The duties of the Job to be Performed were

> Make and repair wood cabinets and tables. Glue venner, fit drawers and hang doors. Use rip and cross saws, combination planer, drill press and portable woodworking machines. Assemble from blueprints, construct, repair and install wood [according to] specifications. Cut and trip parts, drill holes, glue parts together to form complete units. Finish, stain and polish wood according to applied instructions.

AF 03.[2] The requirement for the job was two years of experience.

All five U. S. applicants who responded to the Employer's recruitment were rejected. The reason listed for the Employer's rejection of four of the U.S. applicants were noted as follows: (1) Yeboah, "incapable of production standards;" (2) Fratesi, "not enough cabinet making experience;" (3) Celestin, "looking for part-time temporary work as opposed to permanent position;" and (4) Rubinetti, "did not convey work qualification to our working environment opposed to field installations." AF 42.

Notice of Findings. In the Notice of Findings (NOF) Issued on June 14, 1994, the CO stated that certification would be denied because four of the five U.S. applicants rejected by Employer appeared to be qualified and were rejected for reasons that were not lawful. The CO observed out that Yeboah had thirteen years of experience as a cabinetmaker, yet was rejected by Employer because he was "incapable of production standards," a statement with which the applicant disagreed. Celestin appeared to have ten years of experience, and was rejected because he wanted part-time temporary work, which the CO found questionable in light of the indication in Celestin's application that he was seeking full time work. In addition, the CO

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[2]Transcribed as found in the record.

questioned Employer's rejection of Fratesi whose three years of experience included the installation and layout of cabinets. The Employer's stated reason for his rejection was that he did not have "enough cabinet making experience." Finally, the Employer rejected Mr. Rubinetti, who had two years of experience as a cabinet maker and over twenty years of experience with Dolly Madison Kitchens as assistant foreman. Employer contended that this U. S. applicant did "not convey work qualification to our working environment opposed to field installations," a statement that the CO said he "did not understand." The CO requested full details of each interview, including whether the applicant was rejected on the basis of an interview; the lawful job-related reasons for the rejection; and, if the applicant was rejected on the basis of his resume, the reason for his rejection and the reason why that applicant was rejected without a job interview.

Rebuttal. By his letter of July 6, 1994, the Employer said his decisions were based not only on the information contained in the applications, "which in some cases gives the impression of being overqualified, but also based on the factors stated above," those factors being experience, reliability, commitment to the job and personalities. (1) As to the specific applicants, Employer questioned when Yeboah would have time to work for Employer, as he told the Employer that he was currently working and going to school for electronics. Employer questioned how long this applicant would stay in the position, given that he was taking courses outside his "profession." (2) Employer said that in talking with Celestin and on reviewing his application, he felt that Celestin was "mainly looking for a place to hang his hat until 'things' got better on the outside." (3) Applicant Fratesi was rejected because he had been a service technician, but there was nothing on his application which indicated that he could construct a cabinet. His experience had been in correcting field problems, replacing cabinets, damaged doors, door handles, and drawer tracks. (4) Applicant Rubinetti was "too opinionated, too strong willed." Employer questioned whether they would have a good working relationship. Employer also stated that "there's such a thing as being overqualified" adding that in his opinion, this applicant "certainly seems this way."

Final Determination. A Final Determination (FD) was issued by the CO on July 22, 1994, in which the CO accepted Employer's rejection of Fratesi. The other applicants remained at issue, , however. Specifically, the CO concluded that the Employer had rejected Yeboah and Celestin primarily because Employer did not think they would stay with him, while Rubinetti was rejected because he was "opinionated," "too strong willed" and Employer was uncomfortable with him. Finding that these applicants were qualified and that the employer's rejections were not based on fact, but on subjective feelings and impressions that were not connected with their capacity to perform the job duties, the CO

concluded that the Employer had failed to document that the U.S. applicants were not qualified, and denied certification.

The Employer requested review by letter dated August 23, 1994, and the Appellate file was then referred for action by the Board. AF 90.

DISCUSSION

In requesting review, the president of the Employer stated new "facts" that previously were not a part of the record. In his opinion such newly discosed evidence constitutes the reason for the rejection of the three U.S. applicants at issue. As this Board is strictly an appellate body, our decision is based on the record on which the CO reached this decision, and on arguments submitted in any brief or statement of position by the parties, as provided by 20 CFR §§ 656.26(b)(4) and 656.27(c). It is well established that evidence that first is submitted with Employer's request for review may not be considered in the appeal to the Board. **Capriccio's Restaurant**, 90-INA-480 Jan. 7, 1992). For this reason our consideration of this application for certification is limited to the evidence added to the record in the Employer's rebuttal.

Under 20 CFR § 656.21(b)(6), an employer must document that U.S. workers applying for the job opportunity have been rejected solely for lawful job-related reasons. An applicant will be considered qualified, if he meets the minimum requirements specified for that job in the Employer's labor certification application. **United Parcel Service,** 90-INA-90 (Mar. 28, 1991). In this case, Yeboah, Celestin and Rubinetti were found to be qualified by the CO, and the Employer's discussion of this U. S. applicant did not contradict the inferences that the CO drew from the U. S. applicant's resume. (1) The Employer's explanation of the objection to Mr. Celestin centered on his feeling that this applicant "was mainly looking for a place to hang his hat until 'things' got better on the outside." (2) Employer's rebuttal as to Yeboah also turned on the Employer's doubts that the applicant would stay long. Employer added that, if the courses Yeboah was currently taking were in his "profession" as opposed to the field of electronics, he would feel more secure that he was looking for a permanent position. (3) The Employer rejected Mr. Rubinetti because he was overqualified, and because Employer's president felt "very uncomfortable" with this individual, whom he found to be too opinionated and strong willed.

Employer has failed to adequately document Yeboah's or Celestin's alleged lack of interest in the job. A mere suspicion that the job does not match a U.S. applicant's long-term career goals does not establish lawful reasons for that applicant's rejection. **Hill-Fister Engineers, Inc.,** 89-INA-114 (Feb. 6,

1990). It follows that an employer's statement that it did not believe the potential employee would commit to working for it beyond the next ad offering a better job, was an unlawful reason for rejecting a U. S. applicant. **Kem Medical Products Corp.**, 91-INA-196 (June 30, 1993). Finally, a U. S. job applicant cannot be rejected as "overqualified," the reason that the Employer gave for rejecting Mr. Rubinetti. **Jiffy's Pizza & Pasta,** 93-INA-485 (June 3, 1994). The Employer's assertions that he is "too opinionated" and "strong-willed," and its president's remark that he was "uncomfortable" with this applicant, also fail to provide lawful job-related reasons for rejecting this U. S. worker. **Port Huron Area School District,** 93-INA-319 (April 28, 1995).

In this case the primary reasons for rejecting these U. S. applicants for the position at issue are subjective. While a subjective reason for rejecting a U.S. worker is not, in itself, unlawful, it is the failure to document how the interviewer came to the subjective conclusion and/or failure to document how that subjective reason relates to the job duties that makes the subjective reasons for rejection objectionable. **Rebecca Cantarero**, 90-INA-70 (March 31, 1993).

As the CO correctly pointed out, it is undisputed that these three applicants were qualified. It follows that the Employer's rejections were not based on fact, but on his subjective feelings and impressions concerning the U. S. applicants for this position. Having failed to document adequately how he arrived at these subjective conclusions, or how the subjective reasons relate to the job duties, the Employer has failed to establish that these applicants were rejected for lawful, job related reasons.

ORDER

For these reasons the Certifying Officer's denial of labor certification is Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO.: 95-INA-124

GATEWAY CONTRACTORS, INC., Employer,
Jose Ferreira, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 9, 1997